**UNITED ASIAN BANK BHD.**

**v.**

**CHUN CHAI CHAI & ORS.**

HIGH COURT MALAYA, KUANTAN
IDRIS YUSOFF J
[CIVIL SUIT NO. 77 OF 1982]
14 FEBRUARY 1987

***LANDLORD AND TENANT:*** *Agreement - Failure to supply electricity - Implied terms - Frustration - Failure of consideration - Common mistake - Sections 21 and 66 of the Contracts Act - Section 15 of the Civil Law Act.*

The plaintiffs entered into a tenancy agreement with the defendants. The agreement bore the following salient points. The agreement was for an initial period of three years to commence on a date when possession was passed upon issuance of the certificate of fitness for occupation. The monthly rental was to be RM4,300 with a deposit of RM25,800. The landlords were to carry out renovations essential for the purpose of the tenants' banking business. The tenancy commenced from 20 May 1981. The rental for the 1st three months was as agreed but for the next three months it was reduced to RM3,000 as the plaintiffs had a problem in obtaining electricity. Attempts were made by the plaintiffs to obtain electricity but according to Lembaga Letrik Negara the "basic infrastructure" was not sufficient and a sub-station had to be constructed. When discussions between the plaintiffs and the defendants for the construction of the sub-station failed, the Lembaga Letrik Negara informed the plaintiffs of their inability to supply electricity to the premises. The plaintiffs thereupon wrote to the defendants terminating the tenancy and claimed all monies paid. The plaintiffs' urged a number of grounds to support their claim. The defendants counterclaimed a months rental due to them.

**Held:**

**[1]** As regards the first ground urged by the defendants that there existed an implied term in the contract which required the defendants to provide electricity:

The rule was that Courts would not lightly imply terms, but would do so if it is the intention of the parties. The Court to imply a term would have to ensure that it satisfies the "officious bystander" test. The facts revealed that the question of the supply of electricity had not escaped the attention of both parties. Furthermore electricity had infact been supplied in January 1983. There was no question that electricity would eventually be supplied and in addition owners were not prevented from obtaining a temporary supply of their own initiative. Therefore the "officious bystander" test cannot apply as the plaintiffs' attention was sufficiently directed to this issue but they were nevertheless prepared to accept the tenancy. Further, although there may be delay supply was not an altogether remote possibility. The plaintiffs' claim of this point failed.

**[2]** As regards the 2nd contention of the plaintiffs that there was a total failure of consideration as for 18 months of the 3 year lease the premises were without electricity:

The premises were fit for occupation although it did not have electricity and in any event the plaintiffs could have obtained a temporary supply from other sources. If at all there had been only a partial failure of consideration, but this does not warrant an order for recovery of money paid. There had been no total failure of consideration.

**[3]** As regards the 3rd contention of the plaintiffs that the agreement was frustrated and was incapable of performance:

The question to be decided was whether the requirement of a sub-station was to be regarded as so fundamental as to strike at the root of the tenancy agreement and render a significant change in the obligations of the party from what was contemplated by them.

It was clear that the plaintiffs' were to assume responsibility on all matters pertaining to "connection" only while the defendants were to provide the infrastructure. It was the defendants who were reluctant to put up the sub-station. After a review of the facts of the case and the intention of the parties it was evident that the requirement of a substation was a supervening event which could be regarded as so fundamental as to strike at the root of the agreement and bring about a significant change in the obligation of the plaintiffs from what they contracted for and the doctrine of frustration did apply in the instant case. Since the agreement was frustrated the plaintiffs were entitled to a refund in terms of s. 15 of the Civil Law Act 1956.

**[4]** As regards the last ground urged by the plaintiffs of common mistake as to a matter essential to the agreement, thereby rendering the agreement void in terms of s. 21 of the Contracts Act 1950:

From the evidence it was clear that there was a common mistake as to a matter of fact, namely the requirement of a sub-station. Considering the intention of the parties especially p. 2 of the tenancy agreement where it was expressly stated that the premises were being taken to enable the plaintiffs "to commence its banking business" it was obvious that there was a need for electricity supply to the premises and the sub-station which was the source of such supply was a fact essential to the agreement. The agreement was void in terms of s. 21 of the Contracts Act 1950 and the plaintiffs entitled to the refund claimed, under s. 66 of the Act.

*[Judgment for plaintiffs as prayed with interest and costs. The defendants' counterclaim dismissed.]*

**Cases referred to:**
*Reigate v. Union Manufacturing Co. Ltd. [1918] 1 KB 592*
*Shirlaw v. Southern Foundaries [1926] Ltd. [1939] 2 KB 206*
*Pasuma Pharmacal Corpn. v. McAlister & Co. Ltd. [1965] MLJ 221*
*Yong Ung Kar v. Enting [1965] 2 MLJ 98*
*Fibrosa Spolka Akcyjna v. Fairbairn Lawson Combe Barbour Ltd. [1943] AC 32*
*Cricklewood Property & Investment Trust Ltd. v. Leighton's Investment Trust Ltd. [1945] 1 All ER 252*
*National Carriers Ltd. v. Panalpina (Northern) Ltd. [1981] 1 All ER 161*
*Kin Nam Development Sdn. Bhd. v. Khaw Daw Yau [1984] 1 CLJ 181*
*Davis Contractors Ltd. v. Fareham UDC [1956] AC 696*
*Oh Hiam & Ors. v. Tham Kong [1980] 2 MLJ 159*
*Sheikh Bros. Ltd. v. Arnold Julius Ochsner & Anor. [1957] AC 136*

**Legislation referred to:**
Civil Law Act 1956, s. 15
Contract Act 1950, s. 21
Contract Act [Ind], s. 20
National Land Code 1965, s. 232(1)(c)

**Other source referred to:**
*Chitty on Contracts*, 24th Edn. para. 1814

*For the plaintiffs - M. Sivalingam*
*For the defendants - Andrew Wong Fook Hin*

**JUDGMENT**

**Idris Yusoff J:**

The plaintiff's claim is for the refund of a deposit of RM25,800 and six months rental of RM21,900 paid to the defendants under a tenancy agreement which is alleged to be void on grounds of absence of a certain basic requirement as implied in the terms of contract, failure of consideration, frustration and mutual mistake of fact. The claim is resisted by the defendants who in turn counterclaim for RM4,300 being a month rental due and payable to them.

The facts giving rise to this action stem from the plaintiffs' decision to move to a new business premises since the tenancy to their then existing premises had already expired and they were allowed to continue occupation on monthly tenancy. They finally decided to rent ground floors of 3 units of 3-storey shop houses erected on Lot Nos. 4483, 4484 and 4485 in the Mukim of Kuala Kuantan and also the first floor on Lot No. 4483 (hereinafter collectively called the demised premises). All these 3 units of shop houses were formerly owned by the defendants' father but were transferred to the defendants when the buildings were under construction.

Plaintiffs' decision to occupy the demised premises followed initial negotiations they had with the first defendant and his father. After agreeing to some basic terms, the plaintiffs instructed their solicitors to prepare the agreement (AB2). This was followed by two more letters (AB4 and 5) before a final tenancy agreement was drawn up (AB9).

The agreement bears the following salient points - that the tenancy is initially for 3 years to commence on a date when possession of the demised premises is passed to the tenants upon issual of certificate of fitness for occupation, monthly rental is RM4,300 with a deposit of RM25,800, the grant of further tenancy by the landlords upon expiry of the initial period and the carrying out of renovations essential for the purposes of the tenants' banking business.

The certificate of fitness for occupation was issued by the Municipality on 16 April 1981 but was received by the plaintiffs on 21 May 1981. However with agreement of both parties the tenancy commenced from 20 May 1981. For the first 3 months, the rental was RM4,300 a month but this figure was reduced to RM3,000 for the next following 3 months. Thereafter it was restored to its original figure. The reduction was made at the instance of the plaintiffs due to the problem faced by them in getting the electricity supply for the demised premises.

Attempts were made by plaintiffs to have the electricity supplied to the premises but without success because according to Lembaga Letrik Negara, the "basic infrastructure" then was not sufficient to cater for the load demand of the demised premises. Thus, there was a need for the construction of a sub-station.

When discussions between plaintiffs and defendants for the construction of a sub-station failed the Lembaga Letrik Negara finally wrote up plaintiffs on 8 December 1981 indicating their inability to extend the supply to the demised premises (AB32). After receipt of the said letter, plaintiffs then through their solicitors' letter dated 8 December 1981 terminated the tenancy and requested for the refund of the deposit together with the 6 months rental paid to the defendants. When the defendants failed to respond, plaintiffs filed this action.

The first ground on which the plaintiffs base their claim is that there is in existence an implied term in the contract which requires the defendants to provide a certain basic requirement namely, supply of electricity to the demised premises to enable the plaintiffs to commence their banking business and thus the failure of the defendants to so provide renders the contract void. The defendants' stand is that at common law -

(a) there is no implied warranty that premises will be available for the purpose that the tenant may have in view;

(b) Nor is there any implied warranty on the part of the landlord that the premises may legally be used for any specific purpose even though let for such use;

(c) Nor is there any implied promise to do any act necessary to render the premises available for the purposes for which they were known to be taken;

(d) Nor is there any implied contract that the premises are physically fit for the purpose for which it is let.

In view of the assertion of common law principles, the defendants contend that the allegation of facts by the plaintiffs that "... During the negotiations the plaintiffs notified the defendants that the plaintiffs will occupy the demised premises and enter into the tenancy for purposes of their banking business' is irrelevant and immaterial.

For the plaintiffs it is argued that they are not saying that there is an implied warranty but instead there is an implied term arising from the express terms of the agreement. This is evidenced by the agreement (AB9) which expressly states that the tenant (plaintiffs) is taking the demised premises to enable it to "commence its banking business" and the landlords (defendants) agree "to HOLD the same unto the tenant" for a term of 3 years for that purpose. Furthermore, there is also a provision enabling the tenant to make necessary renovations for the aforesaid purpose.

It is general rule that although the Courts will not lightly imply terms nevertheless they will in certain circumstances enforce not only the terms expressly agreed by the parties but also those which from the express terms are logically to be implied though such implication will much depend on the intention of the parties.

However for the Court to imply terms, it normally has to ensure whether a test known as the "officious bystander" test can apply. The test was propounded by Scrutton LJ in *Reigate v. Union Manufacturing Co. Ltd.* [1918] 1 KB 592 and also by McKinnon LJ in *Shirlaw v. Southern Founderies (1926) Ltd.* [1939] 2 KB 206 at p. 227 In *Shirlaw's* case, McKinnon LJ said:

> *Prima facie* that which in any contract is left to be implied and need not be expressed is something so obvious that it goes without saying; so that, if while the parties were making their bargin, an officious bystander were to suggest some express provision for it in their agreement, they would testily suppress him with a common 'oh, of course!'
>
> At least it is true, I think that, if a term were never implied by a Judge unless it could pass that test, he could not be held to be wrong.

The above test was applied by the Federal Court in *Pasuma Pharmacal Corpn. v. McAlister & Co. Ltd.* [1965] MLJ 221 So did McGilligan J in *Yong Ung Kai v. Enting* [1965] 2 MLJ 98. The issue before me is whether such test can be made applicable to this case.

The facts show that the question of electricity supply does not escape the attention of both parties. This is manifest in the letters written by plaintiffs to their solicitors (AB2 and AB5) whereby it was agreed that the tenancy was to commence once the building was handed to the plaintiffs upon receipt of certificate of fitness even before electricity was available. This is so incorporated in the tenancy agreement.

Furthermore, according to DW1, the demised premises received electricity supply in January 1983 after a substation was constructed behind Malacca Shopping Centre. The demised premises are located in the commercial centre and the shop houses in that area have been supplied with electricity.

It is thus clear that electricity would have been supplied to the demised premises had there been sufficient basic infrastructure to cater for the load demand. However despite being faced with such problem the Lembaga Letrik Negara still endeavored to extend the supply from a sub-station to be constructed though it might take them sometime depending on the availability of the site and the co-operation of the intended consumers.

Encik Md. Khalid bin Ali, the Senior District Manager, Lembaga Letrik Negara Kuantan (PW1) also said that the owners can make their own arrangement from other sources for the temporary supply of electricity, that is by making use of separate generators and the supply must discontinue the moment Lembaga Letrik Negara can provide the electricity.

On the above facts, to my mind the "officious bystander" test can hardly apply as the plaintiffs' attention was sufficiently directed to this issue but they nevertheless were still prepared to accept the tenancy. I would further hold that but for the slight delay the chances of getting electricity supply are not an altogether a remote possibility. Perhaps it would be a different situation entirely if the Lembaga Letrik Negara had indicated that they had no proposal as yet to extend the electricity supply to that area. Hence plaintiffs' claim on this point fails.

The second ground relied upon by the plaintiffs is that there is a total failure of consideration. They contend that initially the tenancy is for a period of 3 years and it is established from evidence that the demised premises were without electricity for about 18 months. Six months after commencement of tenancy, the plaintiffs terminated it on 8 December 1981 and requested the defendants to refund the monies paid to them. There was no response from defendants and on 5 February 1982, they gave notice of intended action to recover the monies. As an analogy, plaintiffs cite the case of a lease where upon a failure of consideration, s. 232(1)(c) of National Land Code applies.

On the facts I do not consider that there is a total failure of consideration. The demised premises are fit for occupation and though electricity supply at that juncture could not be procured it did not refrain the plaintiffs from getting temporary supply from other sources. Furthermore, the plaintiffs conceded that there exists a valid tenancy created by the parties as embodied in the agreement (AB9) and there is nothing in the evidence to show that the demised premises, for some reasons, have not been allowed by the authorities to be used for the intended purpose. Perhaps if at all there is anything in the claim, it can be said that there is a partial failure of consideration and in such a situation, can the plaintiffs get the refund of the money paid under the agreement? In this respect, it seems to me that the plaintiffs are confronted with the obstacle which arises from a general rule that a claim for the recovery of the money paid is not maintainable where there has been a partial failure of consideration. In elucidating this rule, *Chitty on Contracts* (24th Edn.) at para. 1814 says:

> This is based on the theory that the consideration is 'whole and indivisible', and that the Courts will not divide or apportion it unless the parties have done so; another reason is that the parties could not be restored to the situation in which they stood immediately before the time when the contract was made.

Lord Porter in *Fibrosa Spolka Akcyjna v. Fairbairn Lawson Combe Barbour Ltd.* [1943] AC 32 at p. 77 says:

> If a divisible part of the contract has wholly failed and part of the consideration can be attributed to that part, that portion of the money so paid can be recovered... A partial failure of consideration gives rise to no claim for recovery of part of what has been paid.

Going through the events leading to the signing of the agreement and in the light of what has transpired between the parties, I find it difficult to come to a conclusion that the consideration is not "whole and indivisible" and as a corollary, the plaintiffs are not able to recover the monies claimed on this ground.

I now come to the third ground wherein it is contended that the tenancy agreement is frustrated and incapable of performance. For the consideration of this ground some further facts need be set out. PW1 said that if the sub-station was not put up the electricity supply would not be made available even till today. PW2, the then branch manager of United Asian Bank, Kuantan Branch said that when he received the certificate of fitness for occupation it did not occur to him that there might be difficulty in obtaining electricity supply for the demised premises. He only came to know of the requirement of a substation after seeing Encik Jani bin Baba of Lembaga Letrik Negara sometime before 26 August 1981 when Encik Jani told him that the area was highly loaded. The plaintiffs would not have entered into the tenancy agreement had they known that electricity supply could not be made available to the premises and at all times his understanding was that the bank's responsibility was only to get the supply connected to the premises but not to make available a sub-station. He informed first defendant of such requirement whose reply was that he was not aware of such a thing. He aslo informed the defendants that the bank's headquarters had agreed to reserve some space in the building to cater for the sub-station provided the defendants agreed to bear all the expenses and that the said space be leased to Lembaga Letrik Negara for 30 years. These suggestions according to him were disagreed by the defendants.

DW1 in his evidence said it was the understanding of both parties that anything connected with the supply of electricity would be the responsibility of the plaintiffs though he did not foresee any difficulty in getting the supply and the first time he came to know of the requirement of a sub-station was when told by PW2. That understanding was further reinforced by the plaintiffs' request for a reduction of a rental for 3 months as they assumed within that time, they would be able to get the supply. DW1 added that there were further negotiations between plaintiffs, himself and his father sometime in July or August 1981 for additional floor space which resulted in the plaintiffs writing out P5A to their solicitors. He maintained that the failure to put up a sub-station was due to non-commitment of PW2 to agree to pay half of the construction costs and not for any other reason.

In further support of the above understanding the defence also refers to the portion of evidence which shows that at all material times the plaintiffs had been acting on their own without consulting or requesting defendants to be present when they made the approach to Lembaga Letrik Negara for the electricity supply.

The position at law in regard to the applicability of the doctrine of frustration to leases and tenancies is somewhat divided in opinions - see *Cricklewood Property & Investment Trust Ltd. v. Leighton's Investment Turst Ltd.* [1945] 1 All ER 252 but this issue is now settled since the decision of the House of Lords in *National Carriers Ltd. v. Panalpina (Northern) Ltd.* [1981] 1 All ER 161 which held -

> The doctrine of frustration was capable of applying to an executed lease of land so as to bring the lease to an end if a frustrating event occurred during the currency of the term.

However, the application or otherwise of this doctrine depends of the facts of each case.

Lord Simon in *Cricklewood's* case defines frustration as

> ... the premature determination of an agreement between parties, lawfully entered into and in course of operation at the time of its premature determination, owing to the occurrence of an intervening event or change of circumstances so fundamental as to be regarded by the law both as striking at the root of the agreement, and as entirely beyond what was contemplated by the parties when they entered into the agreement. If, therefore, the intervening circumstance is one which the law would not regard as so fundamental as to destroy the basis of the agreement, there is no frustration. Equally, if the terms of the agreement show that the parties contemplated the possibility of such an intervening circumstance arising, frustration does not occur. Neither, of course, does it arise where one of the parties has deliberately brought about the supervening event by his own choice.

The Federal Court in *Kin Nam Development Sdn. Bhd. v. Khaw Daw Yau* [1984] 1 CLJ (Rep) 181 adopted the doctrine on the basis as was stated by Lord Radcliffe in *Davis Contractors Ltd. v. Fareham UDC* [1956] AC 696 to be "not hardship or inconvenience or material loss" but "such a change in the significance of the obligation that the thing undertaken would, if performed, be a different thing from that contracted for". Once the doctrine applies, it operates to terminate the agreement forthwith.

The question in the instant case is whether the requirement of a sub-station is to be regarded as so fundamental as to strike at the root of the tenancy agreement and renders a significant change in the obligation of the party from what was contemplated by them.

It is in evidence that the question of a sub-station never crossed the minds of both parties at all when the agreement was signed or for that matter throughout the negotiation. It only cropped up in August 1981.

Having considered the evidence as a whole, it is my finding of fact that what has been agreed upon by the plaintiffs is to assume responsibility on all matters pertaining to "connection" only while the defendants are to provide the necessary "basic infrastructure". I also accept the evidence of PW2 that it was the defendants who were reluctant to put up the sub-station, reason being that quite apart from "losing" the area needed for the sub-station for 30 years whilst on lease to Lembaga Letrik Negara, they have to spend about RM50,000 on the construction costs. The figure RM50,000 is corroborated by PW1. Further, I am not unmindful of plaintiffs' agreement to get additional floor space despite the requirement of a sub-station but at that stage the plaintiffs were entertaining the hope that the question of the sub-station could be resolved and for my part, I do not see such a move would have any adverse reflection against them.

After viewing the circumstances of the case and in particular the intention of the parties in entering the said agreement, I hold that the requirement of a sub-station was a supervening event which can be regarded as so fundamental as to strike at the root of the agreement

which can regarded as so fundamental as to strike at the root of the agreement which will bring about a significant change in the obligation of the plaintiffs from what they contracted for and in my judgment the doctrine of frustration does apply in the instant case. To my mind, it would be otherwise if the parties had discussed the requirement or possible requirement of a sub-station before the agreement was signed though they were silent as to the party which had to assume the financial obligation. Now that the agreement AB9 is frustrated, the plaintiffs are entitled to the refund pursuant to the provisions of s. 15 of the Civil Law Act 1956.

The last ground advanced by the plaintiffs is common mistake as to a matter of fact essential to the agreement, thereby rendering the agreement void. Section 21 of the Contracts Act 1950 reads:

> Where both the parties to an agreement are under a mistake as to a matter of fact essential to the agreement, the agreement is void.

The plaintiffs contend that as both parties were labouring under a mistake of fact which is essential to the agreement, that is they have no knowledge of the requirement of a sub-station the whole agreement is void. The defendants however maintain that there was no mutual or common mistake as the plaintiffs had applied their minds to the issue of electricity before the agreement was signed. They also claim that even if the parties were under a common mistake, it was not as to a matter of fact essential to the agreement.

Counsel for the plaintiffs from the tenor of his cross-examination initially sought to prove that it was a case of unilateral mistake, that the defendants knew that the sub-station was required but in his written submission decided to abandon that line of approach and settled down on the assumption that both parties were under a common mistake of fact.

In *Oh Hiam Others v. Tham Kong* [1980] 2 MLJ 159, the Privy Council upheld the decision of Gill J (as he then was) in setting aside the sale and transfer of the land on which stood the house, on the ground that there was a common mistake.

In another Privy Council case of *Sheikh Bros. Ltd. v. Arnold Julius Ochsner & Anor.* [1957] AC 136, it was held that "having regard to the nature of the contract which was a kind of joint adventure, it was the very basis of the contract that the sisal area should be capable of producing an average of 50 tons a month throughout the term of the licence, and the mistake was as to a matter of fact essential to the agreement". In that case, the appellant company by an agreement dated 9 December 1950 granted to the first respondent licence and authority - later assigned to the second respondent - to cut, decorticate, process and manufacture all sisal then or at any time thereafter growing on certain lands, of which the appellant was the lessee, comprising about 5,000 acres in Kenya. By Clause 3 of the agreement the licensee undertook, *inter alia,* that he would as from 1 April 1951, manufacture and deliver to the appellant or its agents for sale sisal fibre in average minimum quantities of 50 tons per month.

Disputes between the appellant and the licensee were referred to arbitrators, the questions raised being, whether the agreement was void under s. 20 of the Indian Contract Act by reason of mutual mistake of fact inasmuch as both parties believed, contrary to the fact, that the leaf potential of the sisal area would be sufficient to permit the manufacture and delivery of the stipulated minimum quantities throughout the term of the licence. The appellant contended before the Judicial Committee that the mistake was not as to a matter of fact essential to the agreement.

*a* It is to be noted that s. 20 of the Indian Contract Act is in *pari materia* with s. 21 of our Contracts Act.

From the evidence, I am satisfied that there was a common mistake as to a matter of fact namely, the requirement of a sub-station but the question is whether such fact is essential to the agreement.

*b* Page 2 of the tenancy agreement (AB9) expressly states that the tenant is taking the premises to enable it "to commence its banking business" and by Clause 3(b) of the agreement, the landlords agree that the tenant can make the necessary renovation including "wiring, fitting, installing air-conditioning plant, duct for air-conditioning ceiling ... and other things that may be essential for the purpose of the tenant's banking business ..."

*c* Considering the intention of the plaintiffs in renting the premises, it is obvious that there is a need for electricity supply to the demised premises and I hold that the provision of a sub-station which is the source of the electricity supply to the demised premises is a fact essential to the agreement. In the result, I find that the agreement is void under s. 21 of the Contracts Act 1950 and the plaintiffs are entitled to the refund as claimed under s. 66 of the Act.

*d* Accordingly, there shall be judgment in favour of the plaintiffs for the refund of the deposit of RM25,800 and the rental of RM21,900 with interest at 8% from 8 December 1981 to date of realisation and costs. It therefore follows that the counterclaim of the defendants has to be dismissed with costs.

Also found at [1988] 2 CLJ 253

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